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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 994

RUSSELL W. BORROWDALE,

Petitioner,

vs.

HOWARD R. REULAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner Russell W. Borrowdale prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The Seventh Circuit's opinion below is not yet reported but is reproduced in Appendix "A" infra.

JURISDICTION.

The judgment of the Court of Appeals was entered November 3, 1966. Petitioner's timely petition for rehearing was denied December 5, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I.

In order to comply with the provisions of Admiralty Rule 9 of the United States Supreme Court, there shouldn't be any fact question of waiver, only the question of was there a hearing in compliance thereof.

II.

Are the provisions of Admiralty Rule 10 of the United States Supreme Court complied with where the record does not support and the court failed to make a finding that certain articles were on board when in July of 1964 the vessel and her appurtenances were seized and attached?

III.

Whether the District Court's jurisdiction over the person of R. W. Borrowdale, as limited by the res or property seized ceased on October 4, 1965 when the successful claimant, Howard R. Reuland deposited a Stipulation for Value in the amount of $40,000, to secure the release of the said vessel, and said vessel departed from the jurisdiction of the District Court and thereafter was without jurisdiction of the subject matter seized and the person of Russell W. Borrowdale, the court's jurisdiction as of that date and thereafter being in rem only, over the amount of Stipulation for Value deposited with the court.

IV.

That the finding of contempt is not supported by clear and convincing evidence, that the moving party Howard S. Reuland did not sustain his burden of proof.

STATUTES INVOLVED.

U. S. C. A. 1950 Ed., page 90 Title 28, Rule 9:

RULE 9. *Monition to third parties in suit in rem.*

In all suits in rem against a ship and/or her appurtenances if her appurtenances or any of them are in the possession or custody of any third person, the court shall, on due notice to such third person and after hearing, decree that the same be delivered into the custody of the marshal or other proper officer, if on hearing it appears that the same is required by law and justice.

U. S. C. A. 1950 Ed., page 90 Title 28, Rule 10:

RULE 10. *Process in suits in rem.*

In all cases of seizure, and in other suits and proceedings in rem, the process, if issued and unless otherwise provided for by statute shall be by a warrant of arrest of the ships, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

STATEMENT OF CASE.

The jurisdiction of the district court was invoked because of the nature of the original actions, both of which arose under the exclusive admiralty and maritime jurisdiction of the district court.

Petitioner Borrowdale and Respondent Reuland were adverse claimants in consolidated admiralty actions commenced in the District Court in 1964 by libelants E. Gene

Crane and Curt Herberts against the vessel Happy Pappy to enforce maritime liens. Borrowdale and Reuland each sought to be declared the owner of the Happy Pappy and her appurtenances and to be allowed to defend the suits on behalf of the vessel. On September 25, 1965 the court, after hearing evidence on the issues of ownership and right to possession, entered findings of fact, conclusions of law, and a decree and order, declaring Reuland to be the lawful owner and entitled to possession of the vessel and her appurtenances. On September 30, 1965, Borrowdale, who had temporary possession of the vessel as custodian for the court, delivered the Happy Pappy to Reuland, who had been adjudged owner and was appointed custodian of the vessel until its release to him upon the execution and filing of an approved stipulation for value in the amount of $40,000, to secure Borrowdale's claim for liens against said vessel in excess of $30,000, as well as other lien claimants, who asserted liens against the same said vessel in an amount in excess of $13,000.00

On October 1, 1965 a motion was filed for an order to show cause (B. A. 13)* why the former custodian of the vessel Happy Pappy, Russell W. Borrowdale, the petitioner herein should not be held in contempt for the alleged removal of certain articles from the vessel in question of which he was alleged to be custodian thereof, the allegations stated that the property in question was removed from said vessel sometime between the period of September 23 and September 30, 1965.

It has always been petitioner's position that the articles in question were not removed during the period in question having been removed prior to the vessel's seizure by the U. S. Marshal, that the articles in question were not part of the vessel, that they were not lawfully seized and

* B. A.—Borrowdale Appendix.
R. A.—Reuland Appendix.

therefore not properly before the court, that the U. S. Marshal could not release from custody articles over which he never obtained custody or possession; but that the items in question were the property of the petitioner having been separately purchased, and not a part of the vessel (B. A. 56) (B. A. 58-59) (B. A. 61-62).

On October 6, 1965, by stipulation of the parties the order of October 1, 1965 directing the petitioner to return certain articles to the vessel Happy Pappy by October 4, 1965 was vacated (B. A. 20) and the motion upon which said order was entered was continued until October 8, 1965.

On October 8, 1965 the petitioner on examination by his then counsel stated not only that the articles in question had not been seized, but that in fact he had purchased said articles from the vessel's captain at the port of New Orleans, who seized and sold same in settlement of his wages. This purchase was made after a telephone conversation with a Mr. Dodge, who at that time had sold the vessel to the petitioner, but had not formally consummated the contract of sale (B. A. 61-62). After hearing this testimony (B. A. 57-59) (B. A. 61) the court adjourned the hearing and recommended that the litigants attempt to resolve the matter to their mutual satisfaction (R. A. 78), which they apparently did and later that day they returned to court (B. A. 60) and announced that an agreement was reached with respect to the items of personal property, which could be incorporated into the form of an order which could be presented to the court; and thereafter on that same day, the Rule to Show Cause was discharged. However a draft order setting forth the terms and conditions of the alleged agreement between the parties on that Oct. 8, 1965 was never presented to the Court. During the period of October 8, 1965 to November 9,

1965 in the absence of an order reducing the agreement of October 8, 1965 to writing, no other evidence was heard as to the ownership of the property in question and no determination was entered therein.

In the ensuing period the vessel left Chicago on October 3, 1965, a Stipulation for Value in the amount of Forty Thousand ($40,000.00) Dollars being filed on October 4, 1965, at which time it was stated that the vessel was still within the jurisdictional waters of the District Court.

On November 9, 1965 respondent Reuland filed a motion for an order directing the United States Marshal to release from custody the following described equipment, alleged to be appurtenances of the Vessel Happy Pappy (B. A. 22-24) and on that same day an order to that effect was entered (B. A. 25).

1. Thirteen foot Boston Whaler and brackets for same, and

2. Two Fish-fighting chairs.

Appellant declined to deliver the aforesaid Articles to the U. S. Marshal for the following reasons.

(a) They were never seized by the U. S. Marshal under the monition issued in the libel in rem actions against the vessel.

(b) There was no hearing and determination pursuant to admiralty Rule 9, that in fact the articles in question were appurtenances of the vessel Happy Pappy.

(c) That the order of November 9, 1966 directing the U. S. Marshal to release the aforesaid articles from custody characterized as a turn-over order, was of no force and effect since it was not based on any order finding ownership in respondent Reuland pursuant to admiralty Rule 9, and not

having been seized under process, was not in the possession or custody of the U. S. Marshal at any time during the proceedings.

(d) On October 4, 1965, the successful claimant, Howard R. Reuland, deposited a Stipulation for Value in the amount of $40,000.00, to secure the release of the said vessel, and then left the jurisdiction of the District Court. On that said date, the District Court's jurisdiction over the person of R. W. Borrowdale, as limited by the res or property seized, ceased and thereafter was without jurisdiction of the subject matter seized, and the person of Russell W. Borrowdale; the court's jurisdiction as of October 4, 1965 and thereafter was in rem only, over the Stipulation for Value deposited with the court (*J. K. Welding Co. Inc.* v. *Gotham Marine Corporation*, 47 F. 2d 332).

On motion of respondent Reuland, a Rule to Show Cause was entered against petitioner Borrowdale, and on December 10, 1966 the issue was tried; the district judge finding Russell W. Borrowdale in contempt of Court and on January 7, 1966 entered an order fining him Two Thousand Five Hundred ($2,500.00) (B. A. 5-6) and on appeal the judgment orders of the District Court appealed from were affirmed; costs on appeal together costs of printing additional transcript of record and additional appendix as well as reasonable expenses incurred in the defense of this appeal including reasonable attorneys fees and other items of litigation expense were allowed respondent Reuland (Appendix "A" *infra*, p. 8).

REASONS FOR GRANTING THE WRIT.

I.

There are remarkably few cases dealing directly with Admiralty Rule 9. In the *George Prescott,* 10 Fed. Cases 222 (5,339) at page 223 it stated:

> "A motion was accordingly issued, citing Johnson and Smith to appear and show cause why they should not produce the sails and bedding of the vessel."
>
> "Upon the return of the order and monition the master, crew and purchaser of the vessel at the marshal's sale appeared and submitted affidavits tending to contradict the statements made in the moving papers."

He admitted removing the sails and selling them justifying on the ground that he held a mortgage on the vessel, and was ordered to pay the proceeds into court. Cf. *United States* v. *The Zarko,* 187 F. Supp. 371 (S. D. Calif. 1960) where an armature belonging to a vessel subject to a preferred ship mortgage was in possession of a repairman claiming a lien. It is evident that though the rule has had a limited career in the reported cases, it is a potentially important one, with the widespread increase in sales of pleasure craft of all sizes and description, together with the innumerable transactions relating to equipment purchased for and to be installed on said pleasure craft, the rights of thousands of owners, purchasers and vendors of equipment for same are involved, and in light of the record of only two reported cases in ninety-five years, it is important that this Honorable Court construe this rule; that in order to comply with the provisions of admiralty Rule 9 in force on the date in question, there shouldn't be any fact question of waiver, only the question of was there a hearing in compliance thereof, and the Court of Appeals was in error in stating in its opinion

p. 4, that it was wholly unnecessary for the Court to resolve any factual issues in this connection, in view of the fact that the trial court failed to hold a hearing and enter a ruling on the ownership of the personal property in question pursuant to the said Admiralty Rule 9.

II.

The provisions of admiralty Rule 10, are the means by which each and every maritime action with few exceptions are instituted, and for the Court of Appeals to hold that the provisions of admiralty Rule 10 are complied with, where the record does not support and the court failed to make a finding that certain articles were on board when in July 1964 the vessel and her appurtenances were seized and attached, is error of the type that could affect so many actions in the future to merit the importance of this Honorable Court's review. The Court of Appeals ruling that jurisdiction over the specific res which was the subject of the November 9, 1965 order, if it did not independently exist, and from the Court's Opinion p. 4 and from the record (B. A. 56) (B. A. 58-59) (B. A. 61) it is evident that it didn't exist, was conferred by the waiver and consent implicit in appellants agreement in open court to deliver the articles to the appellee, and that an order so directing might be entered, is clearly erroneous and not sustained by the record (B. A. 60), in view of the fact that the trial court failed to make a finding that these articles were on board when, in July of 1964, the vessel and her appurtenances were seized and attached pursuant to monitions issued in the libel in rem actions against the vessel.

III.

The statement in the Court of Appeals' opinion Appendix "A" *infra* on page 4 "And, it is obvious that the court had jurisdiction of the person of the appellant, is correct only as it relates to proceedings had prior to October 4, 1965. The Court's reference to its jurisdiction of the persons of the appellant subsequent thereto, particularly in reference to the proceedings had on October 8, 1965 and the order entered on November 9, 1965 is in error, and in direct conflict with the case of *J. K. Welding Co., Inc.* v. *Gotham Marine Corporation,* 47 F. 2d 332 (S. D. N. Y., 1931) which held "that where claimant of arrested vessel filed stipulation for value, admiralty courts jurisdiction is not personal over claimant, but in rem over amount of stipulation."

On October 4, 1965 claimant Howard R. Reuland deposited a stipulation for value to secure the release of the vessel in question. This stipulation covered the said vessel plus all articles and equipment pertaining to same or otherwise belonging to it. By this act of posting the bond, he substituted in place of said vessel a $40,000 Bond, out of which all liens and other claims were to be satisfied.

At page 335 of the opinion it states:

> "It has been held by the United States Supreme Court on a number of occasions that the bond is a substitute for the res, so that in any given case the Court can exercise as much authority over it as if the vessel itself were in the custody of the Court, but no more."

In view of the conflict between the 7th Circuit Court of Appeals and that of the District Court of the Southern District of New York, and for the further reason that a conflict apparently exists between the 7th Circuit Court of Appeals and the United States Supreme Court in several instances is in petitioner's humble opinion of sufficient importance to merit this Honorable Court's review.

IV.

The statement in the Court of Appeals opinion Appendix "A" *infra* on p. 6 that "the existence of a conflict on the testimony of witnesses does not, where credibility is involved, negate the clear and convincing quality of the credited evidence" does not overcome the failure on the part of the moving party to sustain his burden of proof, and the fact that the finding of contempt is not supported by clear and convincing evidence (B. A. 62-74). The finding of the Court of Appeals is erroneous, and in conflict with the following decisions of other circuits.

The facts necessary to establish contempt must be established by clear and convincing evidence, *Fox* v. *Capital Co.*, 96 F. 2d 684, 686; that is more than a mere preponderance of the proof, *Kansas City Power & Light Co.* v. *N. L. R. B.*, 137 F. 2d 77; doubts should be resolved in favor of defendant, *Fox* v. *Capital Co., supra.*

In view of the record on behalf of petitioner (B. A. 62-74) which shows the Court of Appeals ruling to be clearly erroneous and in conflict with settled law in other circuits, petitioner submits that this merits the importance of this Honorable Court's review.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 1967.